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IN THE

Supreme Court of the United States

October Term, 1960

No. 696

WILLIAM J. ALLISON,
Appellant,

vs.

THE STATE OF INDIANA,
Appellee.

PETITION FOR A REHEARING AFTER DENIAL OF CERTIORARI

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Central Publishing Co., Inc., Indianapolis, Ind.

INDEX

Page

Citations and Authorities

Alford v. United States, 282 U. S. 687 3

Arms v. Pierce, Gov. Co. 12, Ind. App. 566 3

Hawkins v. State (1941), 218 Ind. 116 3

McMullin v. Cannon (1958), Ind. App. 150 N. E. 765 4

Petro v. State (1933), 204 Ind. 401 3

Constitution of the State of Indiana 2

Constitution of the United States 2

Appendix A 6

Appendix B 26

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PETITION FOR A REHEARING AFTER DENIAL OF CERTIORARI

To the Honorable Earl Warren, Chief Justice of the United States, and

To the Honorable Associate Justices of the Supreme Court of the United States:

Appellant-Petitioner, William J. Allison, hereby petitions for a rehearing after denial of his Petition for Certiorari to the Supreme Court of Indiana (Statement as to Juris iction having been treated as Petition for Certiorari).

A rehearing is necessary under Rule 58 of this Court, because of new developments, both of fact and law, which have taken place since the filing of the Statement as to Jurisdiction (now treated as Certiorari in this Court's ruling in denying Certiorari). These new developments also require the presentation of a point which was not presented in the petition (Statement as to Jurisdiction) because at that time Appellant was precluded from presenting certain questions that were alleged in his Fifth Assignment of Error in the Indiana Supreme Court but *were not* included anywhere in his briefs.

Appellant filed his "Verified Petition for Writ of Error Coram Nobis" in the Supreme Court of Indiana on the 25th day of January, 1961, a copy of which is set out in Appendix "A". The Supreme Court of Indiana dismissed said petition of March 2, 1961, and a copy of its order of dismissal is set out in Appendix "B". Significance is added to the above because of the importance of the issues involved in the Writ. By this ruling Appellant Allison is denied his constitutional and inalienable right to a fair and impartial trial; in practical effect Allison has no legal remedy even though the Fifth Assignment of Error in the Indiana Supreme Court and the Allegations in the Verified Petition for Writ of Error Coram Nobis recite substantially the same contention—*The Bias and Prejudice of the Trial Judge* which prevented Allison from receiving a fair and impartial trial as guaranteed him by the Constitution of Indiana and the Constitution of the United States.

We sincerely hope that this Court will not consider this Petition for Rehearing frivolous or malicious when we urge that a substantial ground was available to Appellant although not previously presented in his Statement as to Jurisdiction, viz:

Fifth Assignment of Error

The trial court erred in overruling appellant's Motion for John L. Niblack to Disqualify Himself.

The importance of the rulings of a trial court is even more forcibly illustrated when we consider that it is a cardinal principle of law which has universal application in every state in our country that a discretionary ruling by a trial court will not be disturbed on appeal by a receiving tribunal. Thus it inevitably follows that the rulings of a trial judge who was alleged to be biased and prejudiced against the Appellant Allison is of the greatest significance and importance when we see that on Page 11 of Appellant's Statement as to Jurisdiction in this Court that "Inquiry as to arrests of a witness is improper because the law is quite clear that the prosecution in its cross-examination of the defendant is limited to inquiry concerning convictions and not merely arrests. Hawkins v. State (1941), 218 Ind. 116; Petro v. State (1933), 204 Ind. 401," and we further say that on Page 12 Appellant urged the following: "Appellant had the absolute right to cross-examine witness and the trial court erred in excusing a State's witness before the defense had finished cross-examining the witness. Appellant's right to cross-examine a witness under oath is not a rule of procedure or evidence, but is fundamental to due process and cannot, unless waived, be denied by any trier of facts, any court, or administrative tribunal. Arms v. Pierce, Gov. Co. 12, Ind. App. 566," and the ruling of this Court in the case of Alford v. United States, 282 U. S. 687, which we embodied in Appellant's Statement as to Jurisdiction is as follows: "Appellant's counsel should have been permitted to inquire as to the residence of a witness for the prosecution. The law is well settled that while the

extent of the cross-examination of a witness rests in the sound discretion of the trial court, such a rule cannot be construed to authorize the right to exclude proper cross-examination." McMullin v. Cannon (1958), Ind. App. 150 N.E. 765. Alford v. United States, 282 U. S. 687."

The discretionary ruling of a trial court with reference to the admissibility of evidence, and the extent of cross-examination, is usually not grounds for review by the appellate tribunal unless there is an abuse of discretion, and it necessarily follows that the ruling of the trial judge in the instant case is of the utmost importance considering the fact that the trial judge ruled on his own bias and prejudice in his denying and overruling of Appellant's motion for the Honorable John L. Niblack to disqualify himself, which in effect allowed and permitted the trial judge to rule on his own competency in determining the merits of the motion for change of venue from the judge.

In view of the foregoing, and in view of the fact that the rulings of a trial judge have a profound influence on a jury trying a cause, your Appellant is going to take this unprecedented and unparalleled action and ask this tribunal to reconsider its ruling of dismissal and to examine the record with specific reference to the Fifth Assignment of Error, namely, "The trial court erred in overruling appellant's Motion for John L. Niblack to Disqualify Himself," which the Indiana Supreme Court did not rule upon, which Fifth Assignment of Error contained the same reasons assigned in Allison's Verified Petition for Writ of Error Coram Nobis, and we sincerely hope that our action in beseeching this august tribunal to search the record with reference to the Fifth Assignment of Error will not give rise to speculation or conjecture on the part of this Court that we are acting facetiously or maliciously or that we are acting in

any manner to prolong this litigation, and that this Court will believe us when we say that this Petition for Rehearing is well founded in point of law as well as in fact, and that it is not interposed for delay, but that it is made solely to prevent a miscarriage of justice without a legal remedy.

In conclusion, we say that in our opinion this is a case wherein a litigant has been wronged without having a remedy by being denied due process of law and equal protection of the laws in that he has certain constitutional and inalienable rights to a fair and impartial trial by a fair and impartial judge, which has been denied him.

For that reason a rehearing should be granted on the Petition.

Respectfully submitted,

WILLIAM C. ERBECKER,
Attorney for Appellant.

Dated Indianapolis, Indiana
April 14, 1961

CERTIFICATE OF COUNSEL.

I hereby certify that I am the attorney for the Appellant-Petitioner in the above entitled cause and that, in my judgment, the foregoing Petition for Rehearing is well founded in point of law as well as in fact, and that the said Petition is not interposed for delay and that said Petition is restricted to grounds permitted by Rule 58 of this Court.

William C. Erbecker

WILLIAM C. ERBECKER,
Attorney for Appellant.

Dated: April 15, 1961
Indianapolis, Indiana

(Appendices Follow)

APPENDIX "A"

IN THE SUPREME COURT OF INDIANA

(Original Action)

THE STATE OF INDIANA
vs
WILLIAM J. ALLISON
No. 30055

VERIFIED PETITION FOR WRIT OF ERROR CORAM NOBIS

Comes now the defendant in the above entitled cause, being the petitioner in this Verified Petition for Writ of Error Coram Nobis, and respectfully represents and shows to this Honorable Tribunal as follows:

1.

That he is filing this Petition for Writ of Error Coram Nobis as an original action in the Supreme Court of Indiana pursuant to and by virtue of the decision handed down by this Court in the case of Partlow vs. The State, 191 Ind. 657, and 195 Ind. 164, and for the further reason that the grounds and reasons sought herein occurred after the trial and judgment in the lower Court and after judgment was rendered therein and while this cause was being prosecuted and presented on appeal to this Court.

2.

That your petitioner now beseeches this Court to hear and entertain this petition as an original action because of the fraud perpetrated on defendant, all as hereinafter set

out in this petition, and because the errors and fraud complained of occurred subsequent to the judgment rendered in the Trial Court, and prior to the submission of this cause to this Court, and because this original action is the only method and procedure available to the defendant-petitioner wherein he can set out for review for this Court all the facts by which his judgment of conviction was fraudulently obtained, and wherein he was precluded and prevented from having a fair determination and review by this Court of the facts and circumstances wherein his constitutional rights were denied him.

3.

A brief resume of the question raised and presented is as follows:

On the 23rd day of May, 1957, the Grand Jury of Marion County, Indiana returned an indictment against your petitioner in two counts charging a misdemeanor of Disorderly Person while using the telephone. The charge was filed in the Criminal Court of Marion County, Division 1, presided over by Scott A. McDonald, Regular Judge of said Court; a change of venue from judge was timely and properly filed, and thereupon the said Scott A. McDonald offered a panel of three from which a Presiding Judge was to be selected; namely, A. Richard Fulmer, Keith Reese, and the Honorable John L. Niblack, Regular Judge of Marion Circuit Court. Your defendant-petitioner struck the name of Keith Reese, for reasons of which appeared in an affidavit which is attached to this motion, the State of Indiana struck the name of A. Richard Fulmer, leaving the Honorable John L. Niblack chosen as Special Judge to try this cause. The Honorable John L. Niblack qualified as Judge and accepted jurisdiction, and before arraignment was held, your

defendant-petitioner filed a motion entitled *Verified Motion* requesting that the Honorable John L. Niblack disqualify himself from the serving as judge in the above entitled cause, a copy of which motion is attached hereto, made a part of this petition and for identification marked Exhibit "A"; thereupon the Honorable John L. Niblack overruled and denied said motion; thereupon your petitioner-defendant filed his motion to quash each count of the indictment, and said *Motion to Quash* was overruled. Trial was had by jury and the jury returned a verdict of guilty as to each count of the indictment and the Court thereupon sentenced your defendant-petitioner to a period of six months in the Marion County jail and fined him Five Hundred Dollars and costs on each count. Your defendant-petitioner filed a motion for a new trial and the same was by the Court overruled. Prayer for appeal was filed, bond was set and defendant-petitioner timely prosecuted his appeal, and this cause was submitted in and to the Supreme Court of Indiana on September 10th of 1958, bearing number 29714.

At the time of the submission, defendant-appellant timely and properly filed his Assignment of Errors which were as follows, to-wit:

Comes now the appellant and says that there is manifest error in the proceeding and judgment of the trial court prejudicial to him in that:

1. The trial court erred in overruling appellant's Motion to Quash each count of the Indictment.

2. The trial court erred in overruling appellant's Motion to Quash Count 1 of the Indictment.

3. The trial court erred in overruling appellant's Motion to Quash Count 2 of the Indictment.

4. The trial court erred in overruling appellant's Motion for a New Trial.

5. *The trial court erred in overruling appellant's Motion for John L. Niblack to disqualify himself.*

WHEREFORE, appellant prays that the judgment of the trial court be reversed and for all other proper relief in the premises.

Appellant's brief was filed on January 7, 1959, and *nowhere in appellant's brief is there mention or reference* to the 5th Assignment of Error; namely, *THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR JOHN L. NIBLACK TO DISQUALIFY HIMSELF.* Your defendant-petitioner most vehemently contends that the failure, negligence and refusal of his counsel to present, embody, enumerate, incorporate, and allege this Assignment of Error in his brief constitutes sufficient grounds and sufficient reasons to now present this flagrant violation and denial of your defendant-petitioner's rights to the attention of this Court as an original action herein.

Petitioner-defendant further says that after the Honorable John L. Niblack overruled and denied said motion requesting that the Honorable John L. Niblack disqualify himself from serving as judge in this cause as aforesaid, the said John L. Niblack subsequently made rulings which were assigned as independent error in appellant's brief along with the various grounds and reasons assigned in the motion for a new trial, and a resume of them is as follows:

(a) Refusal of trial court to allow trial counsel, Edwin J. Ryan, to cross examine State's witnesses;

(b) Adverse rulings of the trial court on Offers to Prove;

(c) Adverse ruling of the trial court on various questions propounded;

(d) Adverse ruling by the trial court sustaining objections by the State;

(e) Adverse ruling by the trial court on admissibility of certain evidence concerning telephone conversations of matters made prior to the enactment of the law in question;

(f) Adverse ruling of the trial court on Motion to Quash;

(g) Adverse ruling of the trial court on Motion for New Trial.

Petitioner-defendant further alleges and says that to support and buttress his motion requesting that the Honorable John L. Niblack disqualify himself from serving as judge in the trial below, counsel Joseph L. Kivett filed his supporting affidavit on the motion to disqualify, a copy of the affidavit of Joseph Kivett is attached hereto, made a part of this petition hereof and for identification marked Exhibit "B".

6.

Petitioner-defendant Allison further says that he was most vehement in his numerous requests and protestations that his counsel embody, present and incorporate in his Appellant's Brief the 5th Assignment of Error; namely, "The trial court erred in overruling appellant's motion for John L. Niblack to disqualify himself", but that his counsel and attorney of record in this Court utterly disregarded the wishes, pleadings and demands of your defendant-petitioner and failed, neglected and refused to present, embody and incorporate same in said Appellant's Brief, well knowing the necessity therefor and the legal import thereof. That

the refusal, failure and negligence of counsel to incorporate said Assignment of Error in your defendant-petitioner's original brief fraudulently deprived him of having this august tribunal examine, pass upon and adjudicate the glaringly apparent fraud perpetrated upon him aforesaid as shown therein. The failure, negligence and refusal of your defendant-petitioner's counsel to incorporate this Assignment of Error permitted the Honorable John L. Niblack *alone* to pass on his qualifications as trial judge, and fraudulently deny your defendant-petitioner the right to legally determine and adjudicate the correctness of Trial Court's ruling, and as a result thereby your petitioner's constitutional rights were invaded, prejudiced and denied by your petitioner's inability to have this question raised and presented for this Court's determination.

7.

Petitioner-defendant further alleges and says that this Court did not have all of the errors assigned and presented in the Assignment of Errors filed in this Court at the time of the submission of this cause presented for their perusal and study in this appeal, and your defendant-petitioner was fraudulently prevented and deprived from having this Court pass upon the 5th Assignment of Errors; namely, "The Trial Court erred in overruling appellant's motion for John L. Niblack to disqualify himself," and consequently this Honorable Court did not have the opportunity to pass upon this assigned error; and this Honorable Court was mistaken in the facts in this case in assuming that your defendant's constitutional rights were fully, amply and completely defended and protected in said appeal; that a fraud was perpetrated upon your defendant by this Assignment of Error in not being presented to this Court by brief of otherwise, and that the only method, means and

manner by which your defendant-petitioner can have his constitutional rights protected is for this Court to hear and entertain this Petition for Writ of Error Coram Nobis as an original action in this Court by reason of the fradulent acts aforesaid.

8.

Petitioner further alleges and says that if this Court grants the petitioner the right to present this case for determination herein it will be necessary for petitioner herein to call several witnesses, and petitioner requests that he may be permitted to introduce evidence and witnesses in this cause to supplement, implement, buttress and sustain the allegations hereinbefore set out.

9.

Petitioner further alleges and says that for another and further ground and reason for requesting this court to entertain this cause as an original action is that his physical condition has deteriorated to such an extent due to his heart trouble, diabetes, hypertension, gout and general infirmities he is now and has been for the past two years bedfast and unable to leave his bed, and in order to dispense with a multiplicity of trial court procedures and to avoid the delay occasioned thereby and to expedite this hearing in the interest of justice, *he respectfully requests this court to hear and entertain this Verified Petition for Writ of Error Coram Nobis.*

10.

Petitioner further alleges and says that the Exhibits attached hereto; namely, the Verified Motion of William Allison requesting that the Honorable John L. Niblack disqualify himself from serving as judge in the above entitled cause, and the Exhibit entitled the Affidavit of Joseph L.

Kivett, are copied verbatim from the transcript filed in this Court which was submitted in this Court on September 10, 1958, and which have been made a part of the record therein, all of which was available to your defendant's counsel at the time of the preparation and filing of his appellant's brief in the appeal.

WHEREFORE, your petitioner herein respectfully prays this Honorable Court that a Writ of Error Coram Nobis issue out of and under the seal of this Court, and that this Court permit petitioner to file this petition and that the Court hear and entertain the same, and that this Court permit testimony to be introduced herein as it deems advisable, and that upon a hearing thereof, that this Court vacate, set aside and hold as naught the judgment of conviction heretofore entered against your petitioner, and that a new trial be granted, *or in the alternative*, that this Court grant permission for your petitioner-defendant to file motion for new trial in the Trial Court, and that the Criminal Court of Marion County, Division 1, be directed, ordered and authorized to receive and act on a motion for a new trial by your defendant-petitioner, and that said Trial Court be ordered, directed and authorized, to receive, hear and entertain said motion for a new trial; on the grounds hereinbefore alleged, and that said Trial Court investigate, determine and decide the truth or falsity of the matters alleged in this petition, all as alleged herein; and that the Trial Court do, permit and perform all actions and things necessary for a proper presentation, determination and adjudication of these questions herein presented, and for all other further, proper and complete relief as the premises may require.

Respectfully submitted,

/s/ William J. Allison

WILLIAM J. ALLISON

William J. Allison, being duly sworn upon his oath, deposes and says that the matters, facts, statements, averments and allegations contained in the foregoing petition for Writ of Error Coram Nobis are true to the best of his knowledge, information and belief.

Further affiant saith not.

/s/ William J. Allison
WILLIAM J. ALLISON

STATE OF INDIANA
SS:
COUNTY OF MARION

Subscribed and sworn to before me, a Notary Public, in and for said county and state, this 24 day of January, 1961.

/s/ Remster A. Bingham
Notary Public

My commission expires:
April 20, 1964
(SEAL)

STATE OF INDIANA
SS:
COUNTY OF MARION

AFFIDAVIT

William Allison, being duly sworn upon his oath, deposes and says that he is the same William Allison who was the appellant in a cause entitled, William Allison, alias William T. Allison vs. The State of Indiana in a certain cause numbered 29714 which was submitted and filed in Supreme Court on September 10, 1958 and that a short time after the overruling of his motion for a new trial in the Trial Court and prior to the submission of this cause in the Indiana

Supreme Court, he requested, urged and demanded that there be incorporated in his Appellant's Brief on appeal the following Assignment of Error; namely, Assignment of Error No. 5, as follows: "The Trial Court erred in overruling appellant's motion for John L. Niblack to disqualify himself," and that his counsel on several occasions verbally agreed and acquiesced to incorporate the same therein but he nevertheless failed, neglected and refused so to do; that defendant's counsel failed to personally perform the services so requested, and delegated the same to subordinate and junior counsel in the case, and defendant-petitioner's counsel of record failed, neglected and refused on many occasions to personally supervise the incorporation of the assignment of errors in said brief and as a result thereby, this delegation of authority by counsel contributed to the fraud perpetrated upon your defendant. That during the preparation and assembling of said brief, your defendant-petitioner was advised by his counsel that the said 5th Assignment of Error concerning the disqualification of the Honorable John L. Niblack was fully and completely incorporated in said brief; that your defendant-petitioner relied upon these representations of his counsel and believed that these constitutional questions would be incorporated in said brief. That at all times during the preparation of defendant-appellant's brief, your defendant-petitioner was led to believe and did believe that the aforesaid question was incorporated therein for determination by this Court. That defendant-petitioner had friends and acquaintances advise and request his attorney on several occasions, in the presence of defendant petitioner, to emphasize the importance of bringing to the attention of the Supreme Court the motion for disqualification of the said John L. Niblack, which motion the said John L. Niblack had denied in the Court below.

Further affiant saith not.

/s/ William J. Allison

WILLIAM J. ALLISON

STATE OF INDIANA
COUNTY OF MARION } SS:

Subscribed and sworn to before me, a Notary Public in and for said county and state, this 24 day of January, 1961.

/s/ Gensler A. Bingham

My commission expires:
April 20, 1964

IN THE CRIMINAL COURT OF MARION COUNTY
DIVISON NO. ONE

STATE OF INDIANA
COUNTY OF MARION } SS:

THE STATE OF INDIANA
vs.
WILLIAM JOHN ALLISON alias
WILLIAM THOMAS ALLISON } NO. CR 17545 Y

VERIFIED MOTION OF WILLIAM T. ALLISON REQUESTING THAT THE HONORABLE JOHN L. NIBLACK DISQUALIFY HIMSELF FROM SERVING AS JUDGE IN THE ABOVE ENTITLED CAUSE

William T. Allison, being first duly sworn upon his oath, says:

1. He is the defendant in the above entitled cause which is a criminal proceeding consisting of an indictment con-

taining two counts, each charging the defendant with being a disorderly person.

2. The defendant, knowing he could not obtain a fair and impartial trial of said cause before the Honorable Scott A. McDonald, the regularly elected, qualified and acting judge in the above matter, and who presided over said court at the time of the return of the indictment, did on June 15, 1957, file an affidavit and motion for a change of judge from the said Honorable Scott A. McDonald.

3. On the same day, to-wit, June 19, 1957, said motion and affidavit for change of judge was sustained and at that time the said Honorable Scott A. McDonald submitted as a panel of judges the names of Richard Fulmer, Keith C. Reese and your Honor, John L. Niblack.

4. The defendant having filed the change of venue from the judge had the first strike and struck the name of the Honorable Keith C. Reese. The State struck Richard Fulmer. The reason for eliminating the said Keith C. Reese was due to the fact that said Keith C. Reese is a former deputy prosecuting attorney of the Nineteenth Judicial Circuit of Marion County, State of Indiana, and was such at the time said prosecuting attorney's office filed numerous affidavits against this defendant, the defendant having been acquitted or said charges having been dismissed. Also, said Keith C. Reese is either a partner or associated in the same law firm with the Honorable Charles C. Daugherty, the present judge of the Magistrate Court of Marion County, Division Two.

5. The said Keith C. Reese was aware of the fact that this defendant had had difficulties with the prosecuting attorney of the Nineteenth Judicial Circuit and also that he had had difficulties with the Honorable Charles C. Daugherty. In view of this situation the defendant knew he could

not obtain a fair and impartial trial of said cause before the said Keith C. Reese.

6. This affiant is one and the same William T. Allison who was charged and found guilty by the Honorable Charles C. Daugherty, Judge of the Magistrate's Court at Speedway, and holding said office by virtue of an appointment of Your Honor, John L. Niblack.

7. On or about 6:00 P.M. May 17, 1957, this affiant was taken into custody by the Sheriff of Marion County, Indiana, while he was at his home in the City of Indianapolis, Marion County, Indiana. He was taken into custody by virtue of a charge of direct criminal contempt filed by the Honorable Charles C. Daugherty, who after filing the charge of criminal contempt issued a warrant for the body attachment of this defendant. The Court also ordered that this defendant was not to be allowed to furnish any bond.

8. Said defendant employed the law firm of Kivett and Kivett and Sam Blum to represent him in said matter and on Saturday morning, May 18, 1957, this affiant is informed that Joseph L. Kivett, one of his attorneys, telephoned the home of Your Honor to inquire if he could present to his Honor a petition for a Writ of Habeas Corpus and that Your Honor explained to the said Joseph L. Kivett that his court was not in session and to bring the matter over to his court on Monday, May 20, 1957.

9. In the meantime this defendant was ordered to report before Judge Daugherty to be tried on the direct criminal contempt charge Monday evening at 7:30 P.M. in the Magistrate Court at Speedway City, Indiana. On the morning of May 20, 1957, affiant is informed the said attorneys for this defendant filed the petition for Writ of Habeas Corpus and were advised by His Honor that due

to the press of business and the fact there were other petitions for writs filed ahead of this defendant's writ, it would be impossible to hear the same before Tuesday, May 21, 1957.

10. The defendant further says that he has been advised by one of his attorneys, Joseph L. Kivett, that on Monday morning, May 20, 1957, your Honor advised the said Joseph L. Kivett that probably the petition for a Writ of Habeas Corpus should not be filed in his court anyhow for the reason that: "Mr. Allison" (the defendant herein) and himself had had some difficulties over a contempt of court proceeding which was finally settled by the Supreme Court.

11. The defendant would further show to the Court the fact that your Honor and this defendant did have difficulty which was decided by the Supreme Court in September, 1944, which case is reported in 222 Indiana Supreme Court Reports, page 602, 56 Northeastern 2d, page 493, and is captioned, State Ex Rel. Allison v. Marion Municipal Court Room 4, and John L. Niblack, Judge of the Marion Municipal Court Room 4.

12. On May 20, 1957, at about the hour of 7:30 P.M. this defendant was tried and found guilty of the charge of direct criminal contempt of court and was given the maximum sentence under the statute, to-wit, fined $500.00 and sentenced to the county jail for ninety days, and a request to have an appeal bond set was denied. This trial was had before Charles C. Daugherty, the then and now Judge of the Magistrate Court of Marion County, Division Two, said Charles C. Daugerty holds his office by virtue of an appointment by your Honor.

13. After this defendant's conviction of direct criminal contempt he was advised by one of his attorneys, Joseph L. Kivett, that the petition for Writ of Habeas Corpus

filed in your Honor's court would be to no avail for the reason that there was now an adjudication of guilt and said attorney suggested that the petition or complaint for a Writ of Habeas Corpus be dismissed and further proceedings taken direct to the Supreme Court of the State of Indiana. This defendant directed his attorneys to proceed forthwith.

14. On May 23, 1957, at about the hour of 3:00 P.M. the Supreme Court issued a mandatory order directed to the Honorable Charles C. Daugherty directing said judge to set a reasonable bond for this defendant or in the alternative to show cause why he refused to set said bond.

15. The Sheriff of the Supreme Court served said notice upon the said Charles C. Daugherty while he was sitting either as Special or judge pro tem in the Criminal Municipal Court of Marion County, Room No. 3.

16. Joseph L. Kivett, one of the attorneys for this defendant, advises this affiant that after the said Sheriff of the Supreme Court served said order upon the said Charles C. Daugherty, the said Sheriff departed from the court room and that the said Judge Daugherty addressed himself to said Joseph L. Kivett and said he would have to call the boss to see what he should do about fixing a bond, that the said Joseph L. Kivett inquired who was the boss and the said Judge Daugherty answered, "Judge Niblack." The said Judge Daugherty advised the said Joseph L. Kivett, so this affiant is informed, that he and Judge Niblack had discussed the matter of the bond and had decided to probably fix a bond in the sum of $5,000.00 the next day, and further stated that he had so advised Mr. Sam Blum, one of the attorneys for the defendant, of said discussion. Whereupon the said Joseph L. Kivett acknowledged that he had been informed of such conversation but stated that in view of everything

that had transpired in this case he was not relying upon promises and felt he should proceed as the law provided.

17. Affiant further states that the said Joseph L. Kivett stated that the said Judge Niblack was not in court and was not present at the time of the conversation above related and that the court over which the said Judge Daugherty was presiding was not in session.

18. The defendant herein files with this petition the original affidavit of Joseph L. Kivett which supports the allegations contained in rhetorical paragraphs 16 and 17 and also relative to the conversation of Your Honor and the said Joseph L. Kivett on May 10, 1957, marks the same Exhibit A and makes it a part of this motion and petition.

19. The defendant would further show to the Court that when he was languishing in the Marion County Jail without being afforded the right to furnish bail, the newspapers of Indianapolis published editorials and by innuendo possibly became critical of Your Honor. Your Honor wrote letters in response to these editorials which appeared in each of the papers, both the editorials and response concerned this defendant and also concerned Your Honor. Needless to say, the defendant had nothing to do with either the preparing or publishing of any of the articles.

20. The Constitution of the State of Indiana, among other things, guarantees to this defendant the right to a fair and impartial trial before a fair and impartial judge and jury, if the case is tried before a jury. The law also presumes this defendant to be not guilty. This defendant knows that if His Honor sits as judge he cannot obtain a fair and impartial trial.

21. Affiant states that he is not charging either directly or by innuendo that His Honor is not honest.

22. The defendant would further show to this Court that he is innocent of the charges in this case and is not guilty. The defendant does not believe that the indictment returned against him is sufficient and also believes that the act under which the indictment is brought is unconstitutional. These respective questions will be raised by appropriate motions at the proper time and the Court will be called upon to interpret the law.

23. In addition, the facts in this matter will show that there has been much publicity attached to the alleged activities of this defendant and there has been much discussion of this case among diverse persons in Indianapolis and Marion County and it may be necessary for this defendant to file an application for a change of venue from the county. Certainly in a situation of this kind this defendant is entitled to have sitting as a judge a person who could not possibly have any interest one way or the other in said matter and who could be completely and unequivocally free to make his own decision based solely upon the law and the evidence and not from any information gained by hearsay or by personal contact with the man standing before him for trial and judgment.

24. This affidavit is not made for the purpose of delay, is made in the best of faith and defendant asks that the Court sustain the same, and for such order as the Court deems just and proper.

/s/ William T. Allison

Subscribed and sworn to before me this 8th day of July, 1957.

/s/ Mildred Rainwater

My commission expires:
May 23, 1961

EXHIBIT "B"

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

AFFIDAVIT OF
JOSEPH L. KIVETT

Joseph L. Kivett, being first duly sworn upon his oath, says that he is a member of the law firm of Kivett and Kivett, attorneys, 1019 Illinois Building, Indianapolis, Indiana, and was such at all times mentioned in this affidavit.

1. Among the clients of said firm of Kivett and Kivett is William T. Allison, and this affiant and his said firm have in the past and do now represent the said Allison in several different matters, both criminal and civil.

2. That on Friday, May 17, 1957, between the hours of 4:30 and 7:30 P.M. of said date, the said Allison was arrested on a body attachment issued by the Honorable Charles C. Daugherty, a Magistrate Judge of Marion County, on a charge that the said Allison was guilty of direct criminal contempt of the court over which the Honorable Charles C. Daugherty presided.

3. At the time of said arrest the said affiant was in the City of Greencastle, Putnam County, Indiana, where he had been for two weeks participating in the trial of a jury case and was awaiting the results of the deliberation of the jury. This affiant was called by telephone by his brother, Silas C. Kivett, Jr., and advised of the situation and this affiant advised his said brother to explore the possibility of getting some relief through a writ of Habeas Corpus.

4. On Saturday morning, May 18, 1957, between the hours of 8:30 and 10:00 A.M., this affiant did telephone the Honor-

able John L. Niblack, Judge of the Marion Circuit Court, and inquired if the Judge could see his way clear to granting a writ of Habeas Corpus in the Allison matter provided we would bring the same out to his house. The said judge was very courteous but stated that his court was not in session and would prefer for us to bring the matter to him on Monday morning, May 20, 1957. On Monday morning, May 20, 1957, the petition for Writ of Habeas Corpus was filed and the matter presented to His Honor, Judge John L. Niblack.

5. At the time of the presentation the said Honorable John L. Niblack advised this affiant and his brother, Silas C. Kivett, Jr., that at least two or three writs for habeas corpus were filed ahead of the one we had filed and the Court's time would not permit him to give us a hearing before 9:30 A.M. on Tuesday, May 21, 1957. This affiant advised the Court that unless a petition for a Writ could be heard that day, May 20th, that the trial on the direct criminal contempt charge was set for that evening, May 20, 1957, at 7:30 P.M.

6. The court then explained to this affiant and his said brother that we were probably making a mistake to present the matter to him at all for the reason that he had had some difficulty with the said Allison when he was judge of Marion County Criminal Municipal Court, Room 4, and that it had become necessary for the Supreme Court of Indiana to decide the issue.

7. Thereafter, on May 23, 1957, the Supreme Court of this state issued a Writ of Mandate against the said Judge Charles C. Daugherty directing the said Judge Daugherty to provide a reasonable appeal bond in said contempt matter or to show cause why he should not do the same. This affiant was present in Marion County Criminal Municipal

Court Room 3 where the said Judge Daugherty was acting as special judge when said order was served upon the said Judge Daugherty by the Sheriff of the Supreme Court of Indiana. After serving the said order the said Sheriff departed the court room and the said Judge Charles C. Daugherty turned to this affiant and said that he was not going to do anything, or words to that effect, until he talked to the boss. This affiant asked who was the boss and the said Judge Daugherty informed him that it was Judge Niblack. Said Judge Niblack was not present when said statement was so made.

8. Said Judge Daugherty further stated to this affiant that Judge Niblack and himself had discussed the matter earlier that day and had decided that they would probably set a bond at $5,000.00 and that it would not have been necessary to obtain a writ of mandate from the Supreme Court. The said Judge Daugherty advised the affiant that he had informed Mr. Blum of this fact and this affiant acknowledged that Mr. Blum had informed him of the conversation but this affiant explained to the Court, that is Judge Daugherty, that because of the way the entire matter was being handled affiant felt it best to proceed in the Supreme Court as by law provided and to not rely on any oral negotiations.

Further affiant saith not.

/s/ Joseph L. Kivett

Subscribed and sworn to before me this 8th day of July, 1957.

/s/ Mildred Rainwater

My commission expires:
May 23, 1961
(Seal)

APPENDIX "B"

EDWIN K. STEERS,
Attorney General of Indiana
PATRICK D. SULLIVAN,
Deputy Attorney General.
Attorneys for Respondent.

WILLIAM C. ERBECKER,
Indianapolis, Indiana,
Attorney for Defendant-Petitioner.

IN THE

SUPREME COURT OF INDIANA

THE STATE OF INDIANA *Respondent,* vs. WILLIAM J. ALLISON, *Defendant-Petitioner.*	No. 30055

ORIGINAL ACTION

PER CURIAM

The petitioner, William J. Allison, has filed in this court what he designates as a writ of error coram nobis. His petition reveals that he had previously been convicted in the trial court and took an appeal to the court on September 10, 1958, which was determined by this court in *Allison* v. *State* (1960), ——Ind.——, 166 N.E. 2d 171.

The State of Indiana has filed a motion to dismiss the petition herein on the ground that this court has no original jurisdiction to entertain a petition for a writ of error coram nobis. This principle is well established in *Stephenson* v.

State (1932), 205 Ind. 141, at page 194, 179 N.E. 633, 186 N.E. 293 and *Lake* v. *State* (1947), 225 Ind. 76, 72 N.E. 2d 746.

For the reasons stated the petition is dismissed.

BOBBITT, C. J. NOT PARTICIPATING.